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No. 06-6330

IN THE SUPREME COURT OF THE UNITED STATES

DERRICK KIMBROUGH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that, pursuant to United States v. Booker, 543 U.S. 220 (2005), a federal district court has the authority to impose a sentence below the advisory Guidelines range in order to counteract the Guidelines' more severe treatment of crack as compared to powder cocaine offenses.[1] The government has

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[1] The petition also raises the question of how a district court should "consider and balance the various factors spelled out in [18 U.S.C. 3553(a)], and in particular, subsection (a)(6), which addresses 'the need to avoid unwarranted disparity among defendants with similar records who have been found guilty of similar conduct.'" Pet. i. That question is not presented in this case, however, because there is no indication either in the decision below or in the decision on which it relied, United States v. Eura, 440 F.3d 625 (4th Cir. 2006), petition for cert. pending, No. 05-11659 (filed June 20, 2006), that the court of appeals believed that "concern for disparity trumps all other § 3553(a)

previously explained why that contention does not warrant this Court's review. See U.S. Br. in Opp. in Eura v. United States, No. 05-11659 (2006 WL 2789851).

On November 3, 2006, this Court granted certiorari in Claiborne v. United States, No. 06-5618, and Rita v. United States, No. 06-5754, limited to questions formulated by the Court to address various aspects of sentencing procedure under Booker. This case need not be held for the decisions in Claiborne and Rita, in which the questions formulated by the Court do not include the question whether a sentencing court has the authority to consider the crack-powder disparity when imposing sentence, or, more broadly, to consider imposing a non-Guidelines sentence based solely on the court's disagreement with a sentencing policy adopted by Congress. See U.S. Br. in Opp. at 8-10, Wideman v. United States, No. 06-6921 (2006 WL 3505370). Accordingly, the petition for a writ of certiorari should be denied.

In the alternative, to the extent that the Court has determined to hold the petitions in Eura, Wideman, and other cases raising essentially the same issue for the decisions in Claiborne and Rita, the Court should accord similar treatment to the present petition by holding it for Claiborne and Rita and then disposing of

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considerations" (Pet. 20). In Eura, the court of appeals merely concluded that the district court "did not adequately and properly consider" Section 3553(a)(6), 440 F.3d at 632; and in the decision below, the court of appeals did not say anything about Section 3553(a)(6), Pet. App. 1a-3a.

it as appropriate in light of the decision in those cases.[2]

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[2] The government waives any further response to the petition unless this Court requests otherwise.